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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1955.

No. 506.

GULF, MOBILE AND OHIO RAILROAD COMPANY,
Petitioner,

versus

ILLINOIS CENTRAL RAILROAD COMPANY,
Respondent.

PETITION FOR REHEARING.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner prays for a rehearing of the Order of this Court entered on January 9, 1956, denying its petition for a writ of certiorari and that a writ of certiorari be granted to review the judgment of the Court of Appeals for the Fifth Circuit affirming the judgment of the District Court for the Northern District of Alabama.

GROUNDS FOR GRANTING PETITION FOR REHEARING.

The fact that GM&O* itself applied to the Interstate Commerce Commission for authority to abandon operation over I. C.'s railroad is the decisive basis for the majority decision of the Court of Appeals that the obligations of GM&O to pay rental and taxes under paragraph 7 of the 1906 trackage contract still exists. If GM&O had abandoned pursuant to a mandatory order of the Commission issued in a proceeding instituted by the Commission itself (instead of by GM&O), clearly GM&O would not be liable for damages to I. C. for breach of the mutually executory phases of the 1906 Contract. In such event, GM&O would be liable only by way of restitution to I. C. for any performance which I. C. has rendered under the contract and for which it has not been compensated.[1]

GM&O should not be treated as a mere volunteer. The situation is the legal equivalent of one involving a mandatory statutory direction.

This case sharply presents this question: Is continued contractual liability of a railroad acting under an order of the Intertsate Commerce Commission dependent upon whether the Commission proceeding was initiated by the Commission or by the carrier itself? This Court should grant a writ of certiorari to determine that question.

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* Petitioner is herein referred to as "GM&O," and Respondent as "I. C."

[1] See *New York Central & Hudson River R. Co. v. Gray* (1916), 239 U. S. 583.

CONFLICT BETWEEN CIRCUITS.

The decision below is in conflict with the underlying philosophy of the decision of the Court of Appeals for the Second Circuit in **L. N. Jackson & Co., Inc., v. Royal Norwegian Government** (1949), 177 F. 2d 694 (reversing **L. N. Jackson & Co., Inc., v. Lorentzen et al.**[2]). It was there held that a steamship operator was excused from performing a contract although the operator, in furtherance of a Congressional wartime policy, had voluntarily submitted itself to the orders of the United States Maritime Commission and therefore was instrumental in bringing about the direction by the Commission which prevented it from performing its contract for the carriage of goods.[3]

In this case, the Court of Appeals for the Fifth Circuit held that because GM&O, in furtherance of a strong Congressional policy, instituted the Commission proceedings, it cannot rely upon what would otherwise be an excuse for non-performance.

CONFLICT WITH DECISIONS OF THIS COURT.

In the unanimous opinion of this Court in **Colorado v. United States,**[4] Mr. Justice Brandeis stated that a certificate of abandonment "issues not primarily to protect the railroad, but to protect interstate commerce from undue burdens . . ."[5] and he referred twice to the railroad's "Federal duty . . . efficiently to render transportation

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[2] (S. D. N. Y., 1949), 83 F. Supp. 486.

[3] To like effect is the decision of the New York Court of Appeals in *Mawhinney v. Milbrook Woolen Mills* (1921), 231 N. Y. 290, 132 N. E. 93, cited with approval by the Court of Appeals for the Second Circuit in the case above referred to.

[4] (1926), 271 U. S. 153.

[5] 271 U. S., at 162.

services in interstate commerce."[6] It was said in **Texas v. United States**[7] that by the Transportation Act of 1920 the railroads "were subjected to the paramount federal obligation to render the efficient and economical service required in the maintenance of an adequate system of interstate transportation." In each of those cases, the railroad initiated the proceedings before the Commission.

But in the opinion of the majority of the Court of Appeals in this case it is said:

> ". . . we know of no rule of law that makes such duty paramount or superior to the duty to carry out its solemnly made contracts."[8]
>
> "Appellant (GM&O), in effect, says that even if the failure of performance was brought about by its act, it was forced into this action by its duty to the public. This line of argument seems to us to be specious."[9]

If this federal duty is not paramount to a contractual duty, it is not paramount to any duty.

Does such a federal duty exist? The majority of the Court of Appeals says that it does not. If statements of such duty made by this Court are meaningful as expressing a strong and important federal public policy, the decision of the majority of the Court of Appeals is in conflict therewith. This is an important question of federal law which should be decided by this Court.

Lower federal courts, the Commission, and Congress, in the "National Transportation Policy," have all recognized

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[6] 271 U. S., at 163 and 165.

[7] (1934), 292 U. S. 522, 535.

[8] R. 469; Appendix A to Petition for Certiorari, p. 36; 225 F. 2d, at 824.

[9] R. 471; Appendix A to Petition for Certiorari, p. 38; 225 F. 2d, at 824, 825.

that the public interest requires that economies and efficiencies in carrier operations be effected.[10] If railroads were under no duty to bring to the attention of the Commission opportunities to render better, more economical, and more efficient service, this public policy would be frustrated and sterilized. It would be impracticable, even with an army of investigators, for the Commission itself to ferret out all such opportunities or any appreciable number of them as a basis for itself initiating a proceeding.

If state laws are subordinate to this federal obligation of interstate railroads, as was held by this Court in **Colorado v. United States**, and in **Texas v. United States**, private contractual obligations must of necessity be subordinate to it.

CONCLUSION.

For the reasons set forth above, and because of the great public importance of the basic question here presented in the implementation of the National Transportation Policy as declared by Congress, it is respectfully submitted that this petition for a rehearing should be granted and that the petition for a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit should be granted.

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[10] For example, a three-judge court, in *Clarke v. United States* (Dist. Col., 1951), 101 F. Supp. 587, 591, referred to a "basic principle of public utility regulatory law":

> ". . . if economies in operation are possible the public interest requires such economies. . . . So, if a carrier is operating over an established route, but it appears that it can render the same service or a better service by a shorter or cheaper route, the public interest requires the more economical operation."

And the Commission, in its Sixty-second Annual Report to Congress, for 1948, at page 3, stated:

> ". . . much more must be done to increase the efficiency and reduce the costs of railroad operations. The responsibility for effecting improvements lies directly with the railroads."

Certificate of Counsel.

The foregoing petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58 (2).

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Certificate of Service.

I hereby certify that I have this day delivered three copies of the foregoing petition to D. K. McKamy, Esquire, of counsel for Respondent.

This ... day of January, 1956.

.....
Of Counsel for Petitioner.